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Big Sdn Bhd & Anor v Ang Teck Wang

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-516–03 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
20 FEBRUARY 2017

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Tort — Defamation — Publication — Respondent sued appellants for defamation based on letter of termination issued by first appellant — Whether there had been publication of defamatory material to third party

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The respondent was, at the material time, a chief executive officer of the first appellant. On 24 June 2014, the first appellant had issued a termination letter ('the impugned letter') to the respondent which consequently led to the present action. In the court below, the respondent had filed an action for defamation against the appellants and submitted that the impugned letter had tarnished his good name and reputation and that he had suffered loss and damage. The High Court allowed the respondent's claim and found, inter alia, that there was publication of the defamatory material via memo to third parties ie one Cyril Lam ('PW2') and one Aspalela Ramly. Aggrieved by the decision, the appellants filed the present appeal. The issue for determination was whether there had been publication of the impugned letter to a third party.

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Held, allowing the appeal and setting aside the High Court's order with costs of RM70,000 here and below subject to payment of allocator fees:

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(1) There was no evidence of publication to a third party. The impugned letter was marked as 'private and confidential' and handed over personally by the letter writer, the second appellant. There was no evidence that anyone else had seen the letter. Further, PW2 quite candidly admitted that he had not seen the impugned letter, thus, there could not have been publication to him (see paras 14–15).

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(2) What PW2 saw was a memo which was not the subject matter of the present claim. The memo was never adduced as evidence and its exact contents were therefore unknown. There was no cross-examination of the appellants' witnesses on the said memo. The respondent had also failed to call a material witness, Aspalela Ramly who could have verified the contents of the memo. Further, the whole business about publication through a memo seen by PW2 and Aspalela Ramly was never specifically pleaded. Based on the circumstances of the case and the above reasons,

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the decision of the High Court was plainly wrong and thus, appellate intervention was warranted (see paras 15, 18, 21 & 23).

[Bahasa Malaysia summary

Responden, pada masa material, ketua pegawai eksekutif perayu pertama. Pada 24 Jun 2014, perayu pertama telah mengeluarkan surat penamatan kerja ('surat yang dipersoalkan') kepada responden yang akibatnya membawa kepada tindakan ini. Di Mahkamah Tinggi, responden telah memfailkan tindakan untuk fitnah terhadap perayu-perayu dan berhujah bahawa surat yang dipersoalkan telah mencemarkan nama baiknya dan reputasi dan bahawa dia telah mengalami kerugian dan ganti rugi. Mahkamah Tinggi membenarkan tuntutan responden dan mendapati, antara lain, bahawa terdapat penerbitan material fitnah melalui memo kepada pihak ketiga iaitu seorang seorang yang bernama Cyril Lam ('PW2') dan seorang yang bernama Aspalela Ramly. Tidak puas hati dengan keputusan tersebut, perayu-perayu memfailkan rayuan ini. Isu untuk penentuan adalah sama ada terdapat penerbitan surat yang dipersoalkan kepada pihak ketiga.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dengan kos sebanyak RM70,000 di mahkamah ini dan Mahkamah Tinggi tertakluk kepada bayaran fi alukator:

(1) Tidak terdapat keterangan mengenai penerbitan kepada pihak ketiga. Surat yang dipersoalkan ditanda sebagai 'private and confidential' dan diserahkan secara peribadi melalui penulis surat, perayu kedua. Tidak terdapat keterangan bahawa orang lain telah melihat surat tersebut. Selanjutnya, PW2 dengan terus terang mengaku dia tidak melihat surat yang dipersoalkan, oleh itu, tidak terdapat pendedahan surat tersebut kepadanya (lihat perenggan 14–15).

(2) Apa yang PW2 lihat adalah memo yang bukan perkara tuntutan ini. Memo tidak pernah didedahkan sebagai keterangan dan kandungan yang tepat oleh itu tidak diketahui. Tidak terdapat pemerikasaan balas terhadap saksi-saksi perayu-perayu atas memo tersebut. Responden juga gagal untuk memanggil saksi material, Aspalela Ramly yang mungkin mengesahkan kandungan memo tersebut memo. Selanjutnya, keseluruhan kes mengenai penerbitan melalui memo dilihat oleh PW2 dan Aspalela Ramly tidak pernah secara spesifik diplidkan. Berdasarkan keadaan kes dan alasan-alasan di atas, keputusan Mahkamah Tinggi jelas salah dan oleh itu, campur tangan mahkamah rayuan adalah diwajarkan (lihat perenggan 15, 18, 21 & 23).]

Notes

For cases on publication, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 839–843.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Collins v Jones [1955] 2 All ER 145, CA (refd)
Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161, CA (refd)

Appeal from: Civil Suit No 23NCVC-9–02 of 2015 (High Court, Kuala Lumpur)

Ooi Chih Jen (Chris Lim Su Heng, Colin Liew, Nur Khidmah Huzaisham and Joshua Kong with him) (Chris Lim Su Heng) for the appellants.
P Jeyakumar (M Kavetha with him) (Zahir Jeya & Zainal) for the respondent.

Harmindar Singh JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur delivered after a full trial on 22 February 2016. The High Court had allowed the respondent's claims for the tort of defamation with an award of general damages of RM350,000 and aggravated damages of RM100,000 together with interest and costs fixed at RM50,000.

[2] This appeal was heard on 6 October 2016. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

SALIENT FACTS

[3] The salient facts giving rise to the civil suit and as summarised by the learned trial judge and the parties in their written submissions can be stated as follows. The plaintiff commenced employment as the chief executive officer ('CEO') of the first defendant in February 2013. A formal contract of employment was however never finalised.

[4] The plaintiff had about 16 years of experience in the food and beverage ('F&B') business. As the CEO he was tasked with leading the first defendant's group of companies in most areas of the business except in the operation of the first defendant's central kitchen and restaurants. The first defendant was a company involved in the F&B industry. The second defendant is the group CEO of the first defendant.

[5] Sometime in 2014, a dispute arose as to the plaintiff's claim for reimbursement of a sum of RM600,000. This sum was eventually approved and credited into the plaintiff's bank account. Subsequently it was discovered that the plaintiff was not entitled to this payment as the contractual criteria had

not been fulfilled. As a consequence, the first defendant issued a termination letter dated 24 June 2014 to the plaintiff.

[6] It was the plaintiff's case that this termination letter had tarnished his good name and reputation and that he had suffered loss and damage. This action for defamation was then filed. As the impugned letter is the subject matter of this claim in libel, it is necessary to reproduce it in full as the learned trial judge had done. The letter reads:

24th June 2014 Private & Confidential

ALLAN ANG TECK WANG

Chief Executive Officer

- Present -

Dear Allan,

TERMINATION OF EMPLOYMENT

We refer to the company recent development pertaining to:

(1) Abuse of power: capacity of CEO advising BIG in the process of the Ex-Gratia payment vs RM60,000 payment made to you in 30th January 2014, (as per contract stated as Bonus)

(2) RM60,000 payment made under the category of 'reimbursement (travel)' instead of Bonus as per contract. By requesting such payments, you had fraudulently and/or intentionally misrepresented the company by making such payments to you.

(3) Supporting documents for RM60,000: Bills submitted (date shown before joined BIG Group, ex: Personal Car insurance which payment date was 17 December 2012).

(4) Payment as said had not been presented in Exco nor Board meetings for approval. (Refer to item 1, inconsistency of advise).

(5) As per contract of employment made between you and BIG Sdn Bhd on 1st February 2013, under clause 3.b, 'The Employee Shall be entitled to an additional payment of RM60,000 in his second (2nd) year of employment YEAR 2, if and only if the Company declares profit for the calendar year 2013 based on the financial year-end audit'.

(6) All supporting documents submitted after payment is being made to you, (dated 5th May 2014)

It is regretted that arising from this recent development, you have breach your obligation owed to the Group and it is the act of dishonest. We find that you would be unable to fulfill your obligations of your contract of employment. The company, therefore, is left with no other alternative but to terminate your contract of employment with effect from above date by giving you 3 days' notice.

All monies due to you less statutory payment and amount due to the Company (if any) will be paid to you within 1 week from the above date. Please return all Company's belongings to Executive Office by 24 June 2014.

Thank you.

Yours faithfully,

for BIG SDN BHD

t.t.

BENJAMIN YONG

Group Chief Executive Officer

DECISION OF THE HIGH COURT

[7] In essence, the High Court found in favour of the plaintiff based on the following grounds:

(a) there was no dispute that the words complained of referred to the plaintiff;

(b) the words contained in the impugned letter were found and understood to be defamatory in their natural and ordinary meaning;

(c) also, such words complained of will expose the plaintiff to hatred, ridicule or contempt in the mind of a reasonable man and would tend to lower the plaintiff in the estimation of right thinking members of society in general, besides imputing dishonourable conduct and a serious lack of integrity on his part;

(d) there was publication of the defamatory material albeit via a memo. For the question as to whether there was publication to a third party, the reaction of PW2, Cyril Lam, upon seeing the memo on the projector is sufficient to establish that there was publication of defamatory material;

(e) the first defendant's conduct in blocking the plaintiff from all internal communication networks constituted circumstantial evidence that publication must have occurred;

(f) the defendants failed to call Aspalela Ramly, the first defendant's chief human resource officer, as a witness to rebut the plaintiff's contention that the memo bore similar contents to the termination letter;

(g) the plaintiff's explanation for forwarding receipts of expenses to support his entitlement to the RM60,000 was accepted and the defendants' version of events surrounding the RM60,000 payment was rejected; and

(h) the words complained of in the impugned letter were false and malicious in nature as the said letter was withdrawn and a subsequent letter of

termination was issued, which led the court to the conclusion that the defendants knew that the words complained of were false.

THE INSTANT APPEAL

[8] Before us the decision of the learned trial judge was assailed on a number of grounds. After due consideration, we directed the parties to focus their submission on the issue of whether there had been publication of the impugned letter of termination to a third party.

[9] In this context, it is trite law (see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315) that the burden is on the plaintiff to prove three essential elements before he can succeed in an action for defamation, that is, that:

(a) the words complained of are defamatory;

(b) the words complained of refer to the plaintiff; and

(c) the words complained of were published to a third party.

[10] There was no question that the words complained of referred to the plaintiff and were defamatory of him. Allegations of fraud and dishonesty will certainly lower the plaintiff in the estimation of right thinking members of society. We were however concerned with the issue of whether the impugned letter, the subject-matter of the claim, was published to a third party.

[11] Now the learned judge had quite properly addressed her mind to this issue. Her ladyship came to the conclusion that there was publication to a third party as PW2, Cyril Lam, who was the head of the first defendant's IT Department, has testified that he had seen 'something similar' to the contents of the impugned letter the day after he was asked to close the plaintiff's account. The contents were shown on a pull down projector screen in the main meeting room. PW2 said that it was a memo to the board of the first defendant to inform the board as to why the plaintiff was no longer with them.

[12] The learned judge took the view that the said memo that PW2 saw on the projector screen contained the words complained of because of PW2's reaction to the words on the screen. The learned judge also took the view that publication to the servants or officers in the course of work constitutes publication. Accordingly, it was found that there was publication to a third party namely PW2 and Aspalela Ramly, who as it turned out, was never called to testify by either party.

[13] Learned counsel for the appellants/defendants argued with much persuasion that there was no publication of the termination letter as at all

material times the letter was a private and confidential document directed and intended specifically for the exclusive knowledge of the plaintiff and it was not in any way or at any time published to other servants, agents and/or customers of the first defendant. The termination letter was handed over personally by the second defendant to the plaintiff. Importantly as well, it was argued that PW2 had not seen the letter as was evident from his own testimony. There was accordingly no evidence that the termination letter was published to a third party.

[14] In this regard, we are in agreement that there was no evidence of publication to a third party. The termination letter was marked as 'private and confidential' and handed over personally by the letter writer, the second defendant. There was no evidence that anyone else had seen this letter.

[15] As for the evidence of PW2, he quite candidly admitted that he had not seen the impugned letter. So there cannot have been publication to him. What PW2 saw was a memo which is not the subject matter of the present claim. This can be seen from his evidence when questioned by counsel for the plaintiff ('PC'):

PC: Are you familiar with this letter? Have you seen this before?

PW2: Termination letter, no. But the contents I have seen before but never saw the termination letter.

PC: Ok, so you say you have never seen this letter but the contents you are familiar with?

PW2: Not this specific letter. Ya.

[16] The contents that PW2 claims he saw arise from a memo that he saw on a pull down projector screen. This is what PW2 said at the trial:

PC: And could you explain how is that ... How did you come to be familiar with the contents?

PW2: I was ... I was shown something to this effect by Lela. It was the day ... the day straight after I was asked to close of 4 account for Allan, Ya , I ...

PC: Ok, she showed it to you. You said that this letter wasn't given to you. So how was it shown to you? ...

PW2: The late afternoon on that following day met Lela in the board room the main living room and she showed me a soft copy, a projection a soft copy of this I never have any hard copy ... she didn't give me anything, it was purely ... Ya she just showed me on the ... on the projector.

PC: So it was in the office the board meeting room is it?

PW2: The main meeting room.

PC: Main meeting room. It was projected on to the ... Was it the LCD screen or a tv or ...

PW2: A pull down projector screen.

PC: Pull down projector screen. So these contents were projected onto the screen.

PW2: Correct ...

And later on:

PW2: Ya, because obviously I was privy to some information about Allan's dismissal whatever so I was just going in there to have a chat with her ok. She ... So Michelle left the room then Lela ... Lela was you know fishing a bit and asking me whether I knew the reason for you know for this and I gave her my theory that being you know personality clash or whatever it might be and that ... and then believe it was ... I don't think it was on the screen already and then she-brought it up on the screen and said ... and show me ... I think was a memo, I think was a memo, I think was a memo.

PC: Memo to? Memo to?

PW2: It ... It ... a memo I believe to the board, I didn't read 100% properly but my recollection is a memo to board informing the board of ... of why Allan was no longer with us.

PC: And you confirmed ... You are familiar with the contents of this letter at 37 and 38 based on what you have seen on that memo projected onto the Screen.

PW2: Ya. Ya once again I don't know exactly ... it is exactly the same but ...

[17] What comes across from this evidence is that apart from PW2 admitting that he never saw the impugned termination letter, he also does not mention the exact words that he saw on the projector screen. It was therefore unfortunate that the learned judge came to a finding that the words complained of were indeed in the memo based merely on the reaction of PW2 as to what he saw on the screen.

[18] What is also unfortunate is that this memo was never adduced as evidence and its exact contents are therefore unknown except for the rather vague recollections of PW2. We also note that there was no cross-examination of the defendants' witnesses on the said memo. Also significant is the fact that the plaintiff had failed to call Aspalela Ramly as she was a material witness who could have verified the contents of the memo and the events that had transpired during the alleged meeting. The learned judge appeared to have placed the onus on the defendants to call Aspalela Ramly to testify. With respect, this

cannot be right and as we have alluded to earlier, the onus in law is on the plaintiff to prove publication to a third party. The rather vague evidence of PW2 in this context could not by any stretch have displaced or shifted the onus to the defendants.

[19] In this regard it is useful to refer to the dicta in the English Court of Appeal case of *Collins v Jones* [1955] 2 All ER 145 (followed in *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161) where it was observed by Denning LJ (at p 146):

> Assuming that these letters did contain some statements defamatory of the plaintiff, that is not sufficient to ground a libel action. She must show what the actual words were. A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty, and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars, he will not be allowed to go on with the charge.

[20] In the same way, if the plaintiff contends that publication to a third party was effected by the memo, it was imperative that the memo was proved to contain the impugned letter which was the subject matter of the charge of defamation. The vague recollections of PW2 in this regard are insufficient. In fact, his testimony that he had never seen the termination letter is fatal to the plaintiff's case in that publication to a third party remains unproved. Publication, in this context, must be of the whole impugned letter and not parts of it or summarised versions of it or worse still, as in this case, vague recollections of it.

[21] In this connection as well, we have not overlooked the defendants' complaint that this whole business about publication through a memo seen by PW2 and Aspalela Ramly was never specifically pleaded. All that was pleaded in para 6 of the amended statement of claim was that the said letter was authored by the second defendant and was dictated to the secretary, typist, clerical officer and/or the human resource officer in the first defendant's employment, which the plaintiff at present could not identify.

[22] Now no such evidence was adduced at the trial. Instead, publication was sought to be proved through a memo seen by PW2 on a projector screen. If the plaintiff had known of this, he was bound to plead such material facts so that the defendants would be put on notice and they could then bring in evidence to contradict the same. We agree that the way in which such evidence of PW2

was introduced certainly caught the defendants by surprise such that no criticism could then be levelled against the defendants that they failed to produce evidence to the contrary.

CONCLUSION

[23] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong. As a result, appellate intervention was warranted. Accordingly, we allowed the appeal and set aside the order of the High Court with costs here and below fixed at RM70,000 subject to payment of allocator fees. We also ordered the refund of the deposit to the appellants/defendants.

Appeal allowed; setting aside the High Court's order with costs of RM70,000 here and below subject to payment of allocator fees.

Reported by Dzulqarnain Ab Fatar